IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
MAY 25 1976
MICHAEL RODAK, JR., CLERK

No. 75-1503

TEXACO, INC., TEXACO PUERTO RICO, INC., MOBIL OIL CORPORATION, MOBIL OIL CARIBE, INC., EXXON CORPORATION, and ESSO STANDARD OIL S.A., LIMITED

Petitioners

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,

Intervenor-Respondents

UNITED STATES OF AMERICA, COMMONWEALTH OIL REFINING COMPANY, and COMMONWEALTH OF PUERTO RICO,

Intervenor-Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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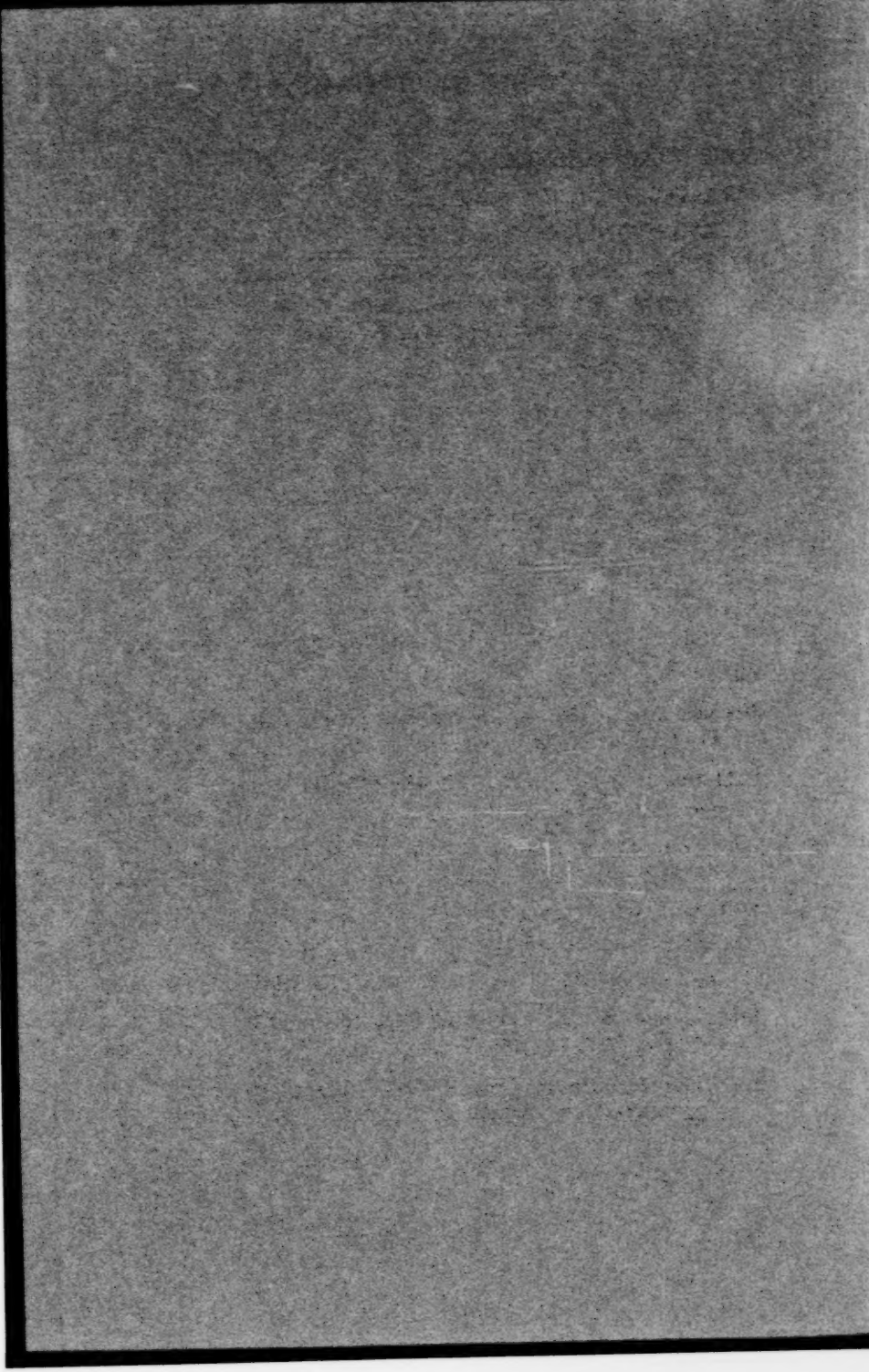
May 25, 1976



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QUESTION PRESENTED

Should this Court review a case in which both the District Court and the Court of Appeals, after careful review of the record and in accordance with controlling precedent, found that the regulation challenged was published after adequate notice, became effective immediately, and was neither arbitrary nor capricious, but was a rational exercise of the agency's statutory authority?

STATEMENT OF THE CASE

This case arises out of the efforts of the Federal Energy Administration ("FEA") to provide for equitable pricing of petroleum products in Puerto Rico. This duty was imposed upon FEA by the Emergency Petroleum Allocation Act of 1973 (15 U.S.C. § 751 *et. seq.*) which called for "equitable prices among all regions and areas of the United States", including Puerto Rico. (15 U.S.C. § 753(b)(1)(F).)

Because of its complete dependence upon foreign crude oil (the price of which could not be controlled by the regulations applicable to domestic crude), Puerto Rico experienced in 1973 and 1974 tremendous increases in the prices charged for petroleum products. These price increases were even greater than those experienced in the mainland United States. They posed a serious threat to the island's already weak economy since petroleum products are virtually its only source of energy.

On March 20, 1974, the FEA sought to eliminate the disproportionate burden imposed on Puerto Rico by virtue of its unique dependence on foreign crude oil. It

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did so by amending its price regulations on an interim basis so as to require Puerto Rican marketers to compute their maximum prices under the FEA's refiner price rule rather than the reseller rule. While making this amendment effective immediately, the FEA simultaneously gave notice of a hearing (later held on April 8 and 9, 1974) to consider whether this or some other solution to Puerto Rico's problem should be permanently adopted. Following the hearings, which were attended by representatives of petitioners, the FEA published on May 20, 1974 a regulation which made permanent the amendment first published on March 20.

* * *

Many of the major American oil companies, including petitioners, operate in Puerto Rico through wholly-owned subsidiaries. Prior to the amendment of March 20, 1974, those subsidiaries had been governed by the FEA pricing regulations applicable to "resellers" (10 C.F.R. § 212.91 *et. seq.*) rather than the regulations applicable to "refiners" (10 C.F.R. § 212.81 *et. seq.*). Under the reseller rule, these subsidiaries were considered to be independent from their mainland parents and were permitted to pass along dollar-for-dollar the price increases for products independently purchased by them.

In view of the upward pressure on prices in Puerto Rico, the application of the reseller rule to these Puerto Rican subsidiaries created an obvious problem in light of FEA's duty to maintain "equitable prices" throughout the United States. The agency was informed in early 1974 that gasoline prices in Puerto Rico could increase as much as 17¢ vis-a-vis mainland prices.

Respondent Commonwealth Oil Refining Company, Inc. ("CORCO"), which imported and refined only

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high-priced foreign crude oil, produced approximately 80 percent of all gasoline consumed in Puerto Rico. The other island refiner of gasoline, Carribean Gulf Refining Corporation (Gulf), accounted for the remaining 20 percent. Both CORCO and Gulf were subject to the FEA's refiner pricing rule. Under this rule, Gulf's prices were determined by averaging the cost of its high-priced foreign crude oil with the cost of the price-controlled, cheaper domestic crude used by its mainland parent. Because of increases in the price of foreign crude oil upon which it was wholly dependent, CORCO, on February 1, 1974, increased the price of gasoline sold to its customers (including petitioners) by 17¢ per gallon. The maximum prices which Gulf was permitted to charge under FEA regulations took mainland Gulf's supplies of cheaper domestic crude oil into account, and hence were substantially lower than CORCO's. Since FEA regulations at the time permitted the Puerto Rican retail marketers to raise their prices in step with their increased costs, a two-tiered retail pricing structure was thus created on the island, causing widespread disruption.

In response to these circumstances, the FEA amendment of March 20 required the Puerto Rican marketers on an interim basis to price their products using the refiner rule rather than the reseller rule. The refiner rule prevented these subsidiaries of U.S. refiners from raising their prices in step with the increases in price charged them by their suppliers, including CORCO. Rather, their prices were determined by averaging such increased costs with the cost increases experienced by their much larger mainland parents, each of which used substantial amounts of low-cost domestic crude oil. The application of the refiner rule to these marketers caused retail gasoline prices in

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Puerto Rico to fall approximately to the levels prevailing on the mainland.

Together with the March 20 amendment, FEA published a notice entitled "Proposed Price Regulations and Public Hearing" which called for public hearings on the question of whether for the future the Puerto Rican marketers should operate under the refiner rule, the reseller rule or "some other form of price regulation". The notice invited interested parties to address themselves to several issues, including "the place in the overall corporate structure of the refiner which is occupied by the Puerto Rican entity . . . ." Appendix to Petition ("Pet. App.") 4a.)

At the hearings on April 8 and 9, 1974 the major oil companies urged return to ther reseller rule to protect the independent profitability of their Puerto Rican subsidiaries. Puerto Rican officials pointed out that a return to the reseller rule would cost Puerto Rico $144,000,000.00 in increased prices over the following year and would inevitably lead to a recurrence of two-tiered retail pricing and resultant instability.

On May 20, 1974, FEA published regulations making permanent the interim regulation which had been published on March 20. In adopting the refiner price rule for Puerto Rico, FEA stated that the foremost consideration in this regard is the adverse impact that the reseller rule would have on the economy of Puerto Rico. In addition to making permanent application of the refiner price rule, FEA responded to comments which had been presented by the marketing companies during the April hearings to the effect that they should no longer be required to adhere to the unusually small profit margins which were in effect in Puerto Rico on May 15, 1973. FEA concluded that an adjustment was in order and allowed the marketing companies to adopt

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the margins which were effective on January 15, 1974, the date the FEA regulations became applicable in Puerto Rico. This permitted the petitioners to raise their prices and they promptly did so.

In deciding to apply the refiner rule on a permanent basis, FEA had also to confront the problem of how to treat The Shell Company (Puerto Rico) ("Shell Puerto Rico") which, unlike all of the other Puerto Rican marketing subsidiaries, is owned by an English rather than an American parent company. The FEA reasoned that under its applicable rules and definitions, Shell Puerto Rico could not be combined with The Shell Oil Company (United States) ("Shell U.S.") for purposes of ordering them to allocate costs as a single firm. Accordingly, it concluded that Shell Puerto Rico, unlike the other Puerto Rican subsidiaries, must be treated as a reseller. Absent further regulation, Shell Puerto Rico would have been permitted to charge prices substantially higher than the other marketers, and the spectre of the two-tiered retail market given renewed life. Accordingly, "to avoid the potentially disruptive and chaotic effects in the marketplace of having one marketer with prices substantially in excess of those of the other marketers", FEA directed CORCO to adjust its prices to Shell Puerto Rico downward and its prices to its other customers upward on a pro rata basis so that CORCO would "continue to obtain a dollar-for-dollar pass through of its increased product costs". In effect, CORCO was ordered by FEA to serve as a conduit for a price adjustment intended to prevent a recurrence of the two-tiered retail price structure which had caused serious economic disruption earlier in the year.

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Other solutions to the Shell problem were considered by FEA and rejected. One possibility was to have Shell Puerto Rico acquire its products from the Gulf refinery which, for the reasons noted above, was required to sell at prices lower than CORCO's. This solution was rejected because the Gulf refinery simply did not produce enough to satisfy the demands of its historical customers and Shell Puerto Rico as well. The other possible solution was to have Shell Puerto Rico average its costs with those of Shell (U.S.). Not only the FEA but other participants at the hearings believed that Shell Puerto Rico could not be required to average in its costs with Shell (U.S.). For example, the Mobil representative testified at the hearings that "Shell . . . can't fold in at all . . . ."

Petitioners did not take advantage of the opportunity to submit additional written comments to FEA after the hearings were concluded. Nor did Exxon and Mobil, following promulgation of the May 20 regulations, seek administrative review. (Texaco sought review one month later.) Instead they immediately implemented those provisions of the regulation which permitted them to increase their prices and profit margins. All three continued to accept product from CORCO knowing of CORCO's adherence to those portions of the May 20 regulation which provided for the Shell price adjustment. Months later they refused to pay invoices tendered by CORCO to reflect their pro rata share of the price reductions which CORCO had granted Shell Puerto Rico under the terms of the regulation. Those invoices, totalling approximately $8,500,000.00, have not yet been paid.

With an easing of the supply situation for crude oil and gasoline, the Shell differential was eliminated on October 4, 1974, after the FEA had obtained assurances from Shell Puerto Rico that it would not

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increase its prices, while efforts were pending to reduce its product costs. The October 4 Order did not provide any pass through cost mechanism between Shell Puerto Rico and Shell (U.S.), the agency continuing to feel that its regulations did not permit such treatment of these two firms.

Petitioners Mobil, Exxon and Texaco (and their wholly-owned Puerto Rican subsidiaries) challenged the amended regulations in the United States District Court for the District of Columbia. On June 17, 1975 the District Court granted summary judgment for CORCO (and for defendant FEA and intervenors Commonwealth of Puerto Rico and the United States) and ordered petitioners to pay CORCO the $8,500,000.00 together with interest at the statutory rate of 6 percent. Petitioners simultaneously appealed to the Temporary Emergency Court of Appeals and to the Court of Appeals for the District of Columbia Circuit. On February 9, 1976, TECA affirmed the judgments of the District Court. TECA subsequently denied petitioners' motion for reconsideration but granted a stay of execution of the judgment, "until the final disposition of any petition for writ of certiorari to the Supreme Court of the United States was (timely) filed". Respondent moved the Circuit Court of Appeals to dismiss petitioners' appeal for lack of jurisdiction. On April 9, 1976, that Court ordered that respondent's motion to dismiss be held in abeyance pending disposition of this petition.

REASONS FOR DENYING THE WRIT

Petitioners have failed to suggest any reasons why this Court should grant the petition. Although they

complain of the result, they cannot seriously contend that the decisions below conflict with the decision of this Court or of any Court of Appeals.

Petitioners tender essentially three issues for review by this Court: (1) whether FEA's actions were arbitrary and capricious; (2) whether petitioners received adequate notice; and (3) whether the May 20 regulation became effective immediately. Each of these issues was exhaustively and painstakingly considered by both the District Court and TECA in light of the standards of review articulated by this Court.

With respect to the rationality of FEA's actions, TECA expressed doubt that the agency could have taken any other course and concluded that its solution was "a rational response to that problem and one which took into consideration the statutory responsibilities of the agency". (Pet. App. 64a.) Regarding adequacy of notice, TECA concluded that under all the surrounding circumstances, the published notice properly informed interested parties of the subjects and issues involved in the rulemaking. (Pet. App. 67a-68a.) Further, TECA concluded that the May 20 order was obviously intended to take effect immediately and that there was good cause for it to do so. (Pet. App. 73a-74a.)

TECA concluded that this was "not a case of any substantial departure from the requirements of the APA or prejudice from technically flawed procedures . . . ." (Pet. App. 75a.) As petitioners failed to show any substantial failings of FEA, so they failed to show any real prejudice to themselves. FEA was not required to hold hearings at all in this matter. It did so "for the purpose of better exploring solutions" to the problem it confronted. (Pet. App. 67a.) With respect to the unique situation of Shell Puerto Rico, FEA "fully explored [it] as a problem requiring solution within the scope of the hearing" and "full opportunity was afforded for

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comment by the representatives of [petitioners]." (Pet. App. 68a.) Both courts below properly concluded that petitioner's had in this case been afforded in all respects the procedural "due process" which the APA is intended to assure. Contrary to petitioners' claim, the decisions below do not allow evasion of the requirements of the APA.

Petitioners were familiar with the problems confronted by FEA. They received adequate notice of the proposed rulemaking. They participated in public hearings. They were given the opportunity to file written comments and to seek administrative review. They interpreted the May 20 order as being effective immediately for purposes of obtaining the benefits it afforded them. In short, petitioners were simply not prejudiced in any material respect. Nevertheless, petitioners would impose the entire $8,500,000.00 cost of the Shell adjustment upon CORCO, despite the fact that CORCO was drafted by FEA to act as a conduit and was never intended to bear any economic risk as a consequence of the FEA regulation.

I.

THE ISSUES POSED BY PETITIONERS WERE CORRECTLY DECIDED BY THE COURTS BELOW IN ACCORDANCE WITH CONTROLLING PRECEDENT.

A. NOTICE

Petitioners argue that the notice of Proposed Price Regulations and Public Hearing published in the Federal Register by the FEA on March 20, 1974, was inadequate in that it did not afford the parties an

opportunity to address and discuss "the special treatment accorded Shell Puerto Rico in the subsequent May 20 Order".

Section 4 of the APA requires that notice of proposed agency rulemaking contain

> *Either* the terms or substance of the proposed rule *or* a description of the subjects and issues involved. [5 U.S.C. § 553(b)(3). Emphasis added.]

TECA specifically found that the March 20 notice adequately informed interested parties of the subjects and issues involved in the rulemaking. The Court's finding in this respect was based upon its thorough consideration of the language of the notice itself, the particular circumstances of its publication, other contemporaneous FEA orders, and the general conditions giving rise to its publication.* In view of this essentially factual determination, TECA concluded that the notice satisfied, as a matter of law, the requirements of Section 4.

The Court's conclusion in this respect is consistent with the decisions of other courts which have considered the proper construction of this provision of the APA. *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954), *Owensboro on the Air, Inc. v. United States*, 262 F.2d 702 (D.C. Cir. 1958).

Petitioners asked the courts below to rule that adequate notice of agency rulemaking must describe with particularily the substance of the rule eventually

*As petitioners point out, the District Court had concluded that the published notice did not by its terms refer to Shell Puerto Rico since it was subsequently found not to be a "subsidiary of a refiner". TECA held otherwise, noting that "the preclusion seen by the trial court in the notice by technically relating the refiner definition from another context is not there either from a technical standpoint or by reasonable intendment". (Pet. App. 66a-67a.)

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adopted. But as the court noted in *International Harvester Co. v. Ruckelshaus*, 155 U.S. App. D.C. 411 478 F.2d 615, 632 n.51 (1973), under such a rule an agency could adjust its position in response to the submissions of interested parties only at the risk of having to begin all over again by publishing the exact rule it has decided to adopt. The APA should not be interpreted to require such an absurd result. See *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646 (1st Cir. 1974).

The courts below concluded that petitioners had even received actual notice that FEA was considering, as one alternative, the precise solution eventually adopted in the May 20 regulation. This finding was based upon the courts' extensive consideration of events which took place at the hearings. The transcript of the hearings was held open in order to afford interested parties the opportunity to make additional written submissions.

Petitioners assert that they do not ask this Court to review this "essentially factual" finding (Pet. 14.). Rather, they ask this Court to determine whether actual notice is sufficient to remedy a deficiency in the published notice of agency rulemaking required by the APA. TECA expressly found that the published notice complied with the statutory requirements. Thus, the issue now raised by petitioners was not dispositive of this case, and it does not form a basis for this Court's review.

B. IMMEDIATE EFFECTIVENESS

Petitioners suggest that the May 20 regulation did not take immediate effect because it contained no express recitation of "good cause". The lower courts held otherwise. Thus, TECA, after an examination of

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the language of the order itself and the circumstances surrounding its publication, found that:

> [T]here obviously was good cause for the regulation to be made effective immediately, and by clear implication where the text of the Order and the related circumstances of record are looked to that was its intent. (Pet. App. 73a-74a.)

The lower courts further concluded that such an order complies with the requirements of the APA, regardless of the absence of the exact language which petitioners suggest the statute requires. It has consistently been held by courts confronted with this question that the APA does not require agencies to parrot the specific language of Section 4. *California v. Simon*, 504 F.2d 430 (T.E.C.A.), *cert. denied*, 419 U.S. 1021 (1974); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (T.E.C.A.), *cert. denied*, 419 U.S. 896 (1974); *Hoving Corp. v. FTC*, 290 F.2d 803 (2nd Cir. 1961).

A contrary rule would exalt form over substance. Both courts concluded that the petitioners were not prejudiced by the agency's failure to include the words "good cause" in the text of the May 20 order. "Good cause" plainly existed. The March 20 order had been, for "good cause", made effective immediately. Petitioners had no reason to suppose that good cause no longer existed on May 20, or that circumstances had arisen which would justify a thirty-day gap in the application of the refiner rule in Puerto Rico.

Further, TECA noted that petitioners themselves treated the provisions of the regulation which benefited them as being immediately effective. (Pet. App. 74a-75a.) Presumably petitioners did not consider that the remaining provisions of the order were to become effective 30 days later. Under these circumstances, this Court should

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have no doubt that the courts below properly concluded that the order complied with the requirements of the APA.

C. JUDICIAL REVIEW

Both courts below found that the regulation in question was a rational response to the problems at hand, intended to fulfill the agency's statutory responsibilities. Under the decisions of this Court, this finding precluded further review by the courts below. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281 (1974); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

It is evident from the opinions of the courts below that each inquired extensively into the circumstances which gave rise to the regulation, including those circumstances which compelled the FEA to single out Shell Puerto Rico for what petitioners characterize as "special treatment". (Pet. App. 27a-41a, 53a-61a.) There is nothing in the record which suggests, as petitioners assert, that the courts below "relied entirely upon administrative expertise" in reaching their decisions.

Petitioners cannot suggest that the courts below failed to give their full attention to the facts and circumstances which give rise to the FEA's action. Their real complaint is that the courts below, following the decisions of this Court, refused to substitute their judgment for that of the FEA. Having failed in their effort in the lower courts, petitioners now invite this Court to judge the wisdom of the agency's action. Respondent respectfully suggests that, in accordance

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with well-established precedent, this Court decline the invitation.

II.

NO CONFLICT OR CONFUSION EXISTS AS TO THE PRINCIPLES OF LAW APPLIED BY THE COURTS BELOW.

The courts below decided this case on the basis of principles of law consistently applied by other courts which have decided similar questions, including this Court and the Courts of Appeals. Petitioners are unable to advise this Court of any decisions applying conflicting principles of law. Instead, they employ a rhetorical device which implies the existence of conflicts where none exist in fact

Petitioners suggest, for example, that the decisions below are "inconsistent with the philosophy behind" *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). In that case, this Court emphasized the importance of fair notice and opportunity to comment, as did the courts below in this case. In essence petitioners' suggestion is that since the courts found adequate notice on the facts in this case, they abandoned the whole philosophy of adequacy of notice.

Similarly, petitioners assert that the courts below ignored the policy of Section 4 of the APA, unlike the courts in *National Ass'n of Independent Television Producers and Distrib. v. FCC*, 502 F.2d 249 (2nd Cir. 1974) and *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1974). Those cases did not involve the issue of what an agency must do to make a regulation effective immediately. They have no bearing on this case.

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Finally petitioners suggest that since TECA found FEA's actions in this case to be rational, it must have abdicated its judicial review function, or at least, subjected FEA to "a different and less exacting standard" of review. (Pet. 19.) Having postulated that a less-exacting standard was applied, petitioners argue that no conflict can arise on the issue whether FEA should be held to a lesser standard because TECA is the only appellate court which reviews FEA actions.

The creativity of this argument fails to compensate for its lack of substance. No conflict exists between the decisions of TECA and those of other courts of appeals. But that is true not because review of FEA actions is confined to TECA. Rather, there is no conflict because TECA applied the standards of review regularly applied by this Court and the Courts of Appeals to the FEA action in question. It never held FEA to a lesser standard.

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CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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